Conflict of Laws – Substantive Law Applied In Multistate Libel Cases

I. Introduction

This paper deals with the question of which substantive law is to be applied in cases in which a multistate publication of defamatory matter is alleged. It must be recognized that there are two distinct steps which must be taken to solve such a case under existing law. These are considered under the headings of "single publication rule" and "choice of law" in that order.

II. Single Publication Rule

Under the common law, each publication of libellous matter gave rise to a separate cause of action.[1] In England, such a principle did not create a hardship upon the courts because of the existence of a single body of law. The application of the same principle in this country, however, results in the dilemma that, if there is a publication in a number of states, separate torts exist in each, so that, presumably, the substantive law of each state must be applied as to the causes of action existing there.[2]

The practical difficulty of applying several bodies of law in one case, or, in the alternative, of requiring separate law suits in all of the states in which there was a publication, has led many courts to adopt the "single publication rule," which provides that a series of publications of the same matter create only one cause of action.[3] A number of states, however, still adhere to the common law rule.[4] The problem is recognized by Judge Learned Hand in *Mattox v. News Syndicate Co.*,[5] where he states:

> We assume that in any event a plaintiff must recover in one action all his damages for all the publications, wherever made; but, if the publication in each state is a separate wrong, the extent of the liability may vary in the separate jurisdictions: for instance, in the case at bar the law of New York may differ from that of Virginia. It would certainly be an unworkable procedure to tell a jury that they should award damages, so far as they were suffered in

[1] Duke of Brunswick v. Harmer, 14 Q.B. 185, 117 Eng. Rep. 72 (1849).

[2] See Hartmann v. Time, Inc., 166 F. 2d 127 (3rd Cir. 1947), *cert. den.* 334 U.S. 838.

[3] Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 So. 193, 37 A.L.R. 898 (1921); Stephenson v. Triangle Publications, Inc., 104 F. Supp. 215 (S.D. Tex. 1952); Wolfson v. Syracuse Newspapers, 254 App. Div. 211, 4 N.Y.S. 2d 640 (1938).

[4] See Hartmann v. American News Co., 69 F. Supp. 736 (W.D. Wis. 1947); Barry v. Kirkland, 149 Neb. 839, 32 N.W. 2d 757 (1948).

[5] 176 F. 2d 897 (2d Cir. 1949), *cert. den.* 338 U.S. 858.

state X, according to one measure, and, so far as they were suffered in state Y, according to another.

Due to the hesitance of some courts to adopt the single publication rule by decision, there has been a call for legislative action, either by uniform act or act of Congress, to alleviate the problem.[6] In response, the National Conference of Commissioners on Uniform State Laws has drafted the Uniform Single Publication Act.[7] Section one of the act provides:

> SECTION I. No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

As stated by the drafters in the prefatory note, "The intention is to adopt the [single publication] rule as it has been developed at common law in the states which have accepted it." There is serious doubt whether the uniform act will accomplish this purpose, due to the language employed. The drafters state that one "edition," "presentation to an audience," or "broadcast" shall result in a single cause of action. If these words are given their ordinary meanings, the act does not adopt the rule as developed by the courts, but, rather, restricts it to one event in time, such as a single presentation of a play or movie. A series of performances, radio or television transcriptions, or late editions of a newspaper or magazine might well give rise to separate causes of action.

On the other hand, if the courts should construe the statute liberally, with a view toward effectuating its stated purpose, its adoption would provide a greatly needed tool for the solution of choice of law cases in this field.

A failure to adopt the single publication rule can be expected to lead to the unsatisfactory conclusion reached by the court in *Hartmann v. Time, Inc.*[8] The holding in that case was that, as to those states in which the rule has been adopted, one law can be applied, but as to those which adhere to the common law doctrine, the law of each must be applied to determine substantive issues.

III. Choice of Law

A solution of the problem as to whether a multistate libel creates one or many causes of action serves merely to introduce the choice of law problem which is involved. Assuming that all of

[6] 60 Harv. L. Rev. 941 (1947); 61 Harv. L. Rev. 1460 (1948); 32 Minn. L. Rev. 734 (1948).

[7] Approved and recommended for enactment in September, 1952.

[8] *Supra*, note 2.

the states in which a publication was made have adopted, by decision or statute, the single publication rule, the question arises as to which law should be applied to determine the substantive issues in the case. It is on this point that the courts have created the greatest confusion.[9]

It is generally accepted that the law of the place of injury is applied to the substantive issues in a tort action.[10] The difficulty encountered by the courts is the application of this test. In an attempt to apply it, they have arrived at a number of criteria for determining which body of law controls. These are set out below with a criticism of each.

(1) SUBSTANTIVE LAW OF THE FORUM

Forum law has been applied in a great number of cases involving a multistate libel, with varying degrees of justification.

In some cases, the allegation of publication has been restricted to the state in which the proceeding is being prosecuted,[11] so that regardless whether there was in fact a national publication, the court is restricted to forum law.

In other cases, the matter upon which an appeal is grounded is a procedural one, going only to the remedy and not to the right involved, so that an application of local law is justified.[12]

Also, it is apparent that in some cases the choice of law problem has not occurred to the parties so that forum law was applied automatically.[13]

At least one court has knowingly applied the substantive law of the forum, in a case in which there was a national publication.[14] Little justification can be offered for an application of forum law in view of the feeling of the courts that the place where suit is brought should not affect the outcome of the case. The only basis upon which such an approach has been justified is that the available alternatives result in insurmountable practical difficulties in presenting the case to a jury, whereas, using this approach, the court can accurately charge the jury on the law in the case.[15] The obvious answer to this line of reasoning is that the courts do not normally react to an argument of expediency in disregard of sub-

[9] For a criticism of the approaches taken by the courts, see 32 MINN. L. REV. 734 (1948); 60 HARV. L. REV. 941 (1947).

[10] Keeler v. Fred T. Ley & Co., 65 F. 2d 499 (1st Cir. 1933); 15 C.J.S. 899.

[11] Wright v. R.K.O. Radio Pictures, Inc., 55 F. Supp. 639 (D. Mass. 1944); Sweeney v. Philadelphia Record Co., 126 F. 2d 53 (3rd Cir. 1942).

[12] Kilian v. Stackpole Sons, Inc., 98 F. Supp. 500 (M.D. Pa. 1951); McGlue v. Weekly Publications, Inc., 63 F. Supp. 744 (D. Mass. 1946).

[13] Spanel v. Pegler, 160 F. 2d 619 (7th Cir. 1947); Baker v. Haldeman-Julius, 149 Kan. 560, 88 P. 2d 1065 (1939).

[14] Curley v. Curtis Pub. Co., 48 F. Supp. 29 (D. Mass. 1942).

[15] *Ibid.*

stantive considerations.[16]

(2) PLACE OF THE DEFENDANT'S ACT

Although several writers suggest that this is a criterion for determining the law to be applied,[17] they cite no cases in which it has been applied, and none have been observed. It is doubtful that any cases will be found, due to the inherent problems involved. As a practical difficulty, the court would have the situation in which the defendant's acts took place in more than one state, as in the *Hartmann* case.[18] Another problem lies in the possibility that such a doctrine would encourage the migration of persons most susceptible to libel suits to states having protective laws, thus defeating the general policies of the law.

(3) PLACE OF FIRST PUBLICATION

Under general tort law, a cause of action for libel arises upon the publication of the defamatory matter.[19] Since it is not necessary to prove damages if the words are libellous *per se*,[20] the cause of action is complete upon the first publication. Using this line of reasoning, it has been held that the law of the state in which the first publication is made should be applied to the substantive issues in the case.[21] In theory, this conclusion follows logically and should be an answer to the problem. It, too, however, has practical difficulties.

One difficulty is the determination, in the event of a simultaneous or near simultaneous publication in several states, of the state in which the first publication was made. Another, raised in the previous section, is the fact that the libel-conscious publisher could pick the state in which to make his first publication, so as to be held accountable under the most beneficial law.

(4) PLACE WHERE THE PLAINTIFF IS ACTUALLY DAMAGED

In *Mattox v. News Syndicate, Inc.*,[22] the complaint alleged, inter alia, that the plaintiff was a resident of Virginia and that libellous matter had been published about her by the defendant

16 See Howser v. Pearson, 95 F. Supp. 936 (D.C. 1951).

17 See 60 HARV. L. REV. 941 (1947); 32 MINN. L. REV. 734 (1948), citing HANCOCK, TORTS IN THE CONFLICT OF LAWS 252 (1942) and COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 315-18 (1942).

18 *Supra*, note 2.

19 Albi v. Street & Smith Publications, 140 F. 2d 310 (9th Cir. 1944); Sarkees v. Warner-West Corp., 349 Pa. 365, 37 Atl. 2d 544 (1944).

20 Washington Times Co. v. Bonner, 86 F. 2d 836, 110 A.L.R. 393 (D.C. App. 1937); Ilitzky v. Goodman, 57 Ariz. 216, 112 P. 2d 860 (1941).

21 Sweeney v. Phila. Record Co., 126 F. 2d 53 (3rd Cir. 1942); Banks v. King Features Syndicate, Inc., 30 F. Supp. 352 (S.D.N.Y. 1939); see RESTATEMENT, CONFLICT OF LAWS § 377.

22 *Supra*, note 5.

in a New York newspaper. The court, recognizing that the plaintiff was not known outside her home state, took a realistic approach toward the choice of law problem and held that, since the plaintiff was damaged only in Virginia, the law of that state would be applied.

A similar decision was handed down in the case of *Caldwell v. Crowell-Collier Pub. Co.*,[23] in which the court said, "Publication is averred in Florida and throughout the United States, but the injury must have occurred mainly in Florida where the plaintiff resides and holds office, and the law of Florida is principally to be regarded."

There is much to be said for this line of reasoning. It recognizes the strong contact which the state of actual injury has with the transaction, and it is not subject to many of the criticisms made previously, to the effect that either the plaintiff or the defendant can decide which law is to be applied by choosing a forum. One shortcoming is that, in the case of a nationally known figure, the plaintiff will suffer actual damage in several states, so that no one of them would be more related to the transaction than the others.

One court which has passed upon this theory rejected it in favor of the application of the law of each state in which a publication occurred.[24]

(5) Each Place of Publication

This is the result which follows from the common law doctrine that each publication results in a separate tort. Some courts, refusing to recognize the existence of a single cause of action for libel, have held that the law of each state must be applied to determine liability for a publication occurring in that state.[25] In *Howser v. Pearson*, the court recognized that such a holding would result in practical difficulties, but it stated that it is the responsibility of the trial judge to devise proper means for the submission of issues to the jury.[26] The objections to this approach were considered under the heading of the single publication rule, so that repetition here is not necessary.

(6) Place of Principal Circulation

The same considerations which led the court in the *Mattox* case[27] to decide that the law of the state where the plaintiff was actually damaged should be applied are persuasive here, to a limited degree. If the plaintiff is a nationally known figure, his real

[23] 161 F. 2d 333 (5th Cir. 1947), *cert. den.* 332 U.S. 766.

[24] Howser v. Pearson, *supra*, note 16.

[25] Hartmann v. Time, Inc., *supra*, note 2; Howser v. Pearson, *supra*, note 16.

[26] *Supra*, note 16. In that case, a special verdict was called for, and separate questions were propounded by the judge.

[27] *Supra*, note 5.

damage might conceivably lie in the state in which the greatest publication is made. In the case of a person who is not known outside one state this approach would have no merit, and would be subject to the added criticism that its adoption would tend to cause the law of New York to be applied in all states in this type of litigation, due to the large population. Some resistance could be expected from the courts of other states.

No cases are found which follow this view. The law review writer who suggested it[28] cites one case as authority, but that case does not deal with the choice of law problem.[29] Nevertheless, it is felt that there may be substantial reasons for considering the law of the place of principal circulation in a proper case.

(7) PLURALITY OF STATES HAVING THE SAME LAW

As in the previous situation, there is no court support for this proposition. The theory is that, faced with a difference in substantive law among the states in which a publication occurred, a court would count the number of states following each particular theory of law, and choose the one followed by the largest number of states as the law to be applied in the case. The mere statement of the concept demonstrates its absurdity. Not only would the court have to determine the law of each state, but it would have to classify them, so far as it would be possible, to be able to enumerate each class. The most ludicrous result would arise in the event of a tie.

The author who suggests the plurality principle states that it would "only add to confusion."[30] The one case cited by that author on the point did not adopt the rule, but, instead, held that the law of each state would be applied.[31]

This survey of methods of approach to the conflict of laws problem has been made to demonstrate that no one of them, standing alone, is a complete answer. In each instance, there is some undesirable result which would follow from a general application of the rule.

We are driven, then, to the conclusion that there should be an attempt to apply, not just one rule for every situation, but a separate set of rules for each type of situation, or, in the alternative, some formula which would combine those meaningful rules in such a manner that the law to be applied in each case would

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[28] Ludwig, *"Peace of Mind" in 48 Pieces vs. Uniform Right of Privacy*, 32 MINN. L. REV. 734, 762 (1948).

[29] Palmer v. Mahin, 120 Fed. 737 (8th Cir. 1903). The court stated that the extent of the circulation of the newspaper was admissable in evidence to show the amount of the plaintiff's damage.

[30] Ludwig, *op. cit.*, note 30.

[31] O'Reilly v. Curtis Pub. Co., 31 F. Supp. 364 (D.C. Mass. 1940).

be readily ascertainable, and, at the same time, subservient to conflict of laws principles. It is believed that there is such a formula.

The court, in *Dale System v. General Teleradio*,[32] dealt with the problem at some length, and concluded that the law of the state having a "grouping of the dominant contacts" should be applied. The contacts which were considered by the court were: (1) Substantive law of the forum; (2) Place of last event (first publication); (3) Point of origination; (4) State of principal circulation; and (5) Domicil of the plaintiff.[33] The conclusion reached was that, since at least three of these (numbers (1), (3), and (4)), and possibly all five, pointed to the law of New York, the law of that state would be applied.

While the court is to be commended for taking a long step in the proper direction, its approach is subject to criticism, in that there was no attempt to analyze the contacts to determine which ones were actually meaningful, nor was there any recognition that some contacts should have greater significance than others. More simply, the court's analysis was quantitative rather than qualitative.

Further analysis, it is believed, would have revealed to the court that some of the contacts it mentioned, and others which it did not mention, have no real significance in choice of law problems, and should not be considered. The first of these is the substantive law of the forum. To apply it as having substantive meaning is to ignore conflict of laws principles.[34] The same can be said for the law of the place of the defendant's act, or the point of origination, which permit the defendant to choose the applicable law. Prior consideration has also eliminated the use of the law of each individual state, or the law of a plurality of the states.

Thus, it is seen that only three meaningful contacts exist. These are:

(1) Place of the first publication (last event), on the ground that it is the place at which a cause of action first arises;

(2) Place where the plaintiff is actually damaged (residence), on the ground that the real wrong exists there; and

(3) Place of principal circulation, on the ground that, in certain cases, it is where the greatest actual injury is incurred.

In the application of these three contacts, a formula may be employed which, it is believed, results in the application, with comparative ease and certainty, of the body of law having the most significant connection in each case, and prevents either the plaintiff or the defendant from controlling which law is to be utilized.

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[32] 105 F. Supp. 745 (S.D.N.Y. 1952).

[33] These are the contacts mentioned by Professor Ludwig in 32 MINN. L. REV. 734 (1948).

[34] A basic tenet of conflict of laws is that no person should be able to decide which law is to be applied in his case by choosing a forum.

We begin with the proposition that the law of the state of first publication will be applied, on the last event theory. However, if there is a showing that there was a publication in a state in which the plaintiff is actually damaged (in most cases, the state of residence), that law will be applied. The final step is that, in the event the plaintiff incurred actual damage in a number of states (celebrity cases, usually), the law of the state in which the principal circulation occurred will be applied.

Hence, using the numbers of the three contacts, (1) is applied unless (2) occurs, in which event it is applied, except that if several states are included in number (2), (3) applies.

It will be seen that the application of this formula does not result in a great hardship upon the court. Furthermore, in each case, the law which is applied will be utilized because it has the strongest substantive connection with the transaction. Additional justification for the application of the formula is found in the fact that, regardless of where the plaintiff sues, or where the defendant chooses to do business, the same law will be applied. The formula also lessens the defendant's ability to control the law to be applied by choosing his place of first publication, due to the application of the law of other states if there is a publication in another state in which the plaintiff is known. It is admitted that in the case of a national celebrity libeled in a national publication, New York law is indicated, but no apology is called for because it is reasonable to believe that the greatest damage would be incurred there, so that New York would have the most substantive relation with the matter.

Conclusion

The least which might be said for the outlined approach is that it is more desirable than the present attitude of the courts. Its adoption, or the adoption of a similar approach, would aid immensely in the solution of choice of law problems in multi-state tort cases and allied fields.

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